

# **APAAC ANNUAL VICTIM ADVOCATE CONFERENCE**

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## **ARIZONA'S GRAND JURIES**

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# Arizona's Grand Jury System

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## What is a Grand Jury?

- "A body of (usually 16 to 23) people who are chosen to sit permanently for at least a month — and sometimes a year — and who, in *ex parte* proceedings, decide whether to issue indictments."  
— *Black's Law Dictionary*
- "True Bill"
  - The term used to refer to an indictment issued by a grand jury
    - Nick and also A.R.S. § 21-414

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## But Wait . . . There's More

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| <ul style="list-style-type: none"> <li>• <i>Civil Grand Jury</i> <ul style="list-style-type: none"> <li>— These grand juries investigate the operations of various governmental officers, departments, and agencies of local governments.</li> <li>— States that use these               <ul style="list-style-type: none"> <li>• California, Florida, New Jersey, Utah . . .</li> </ul> </li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>• <i>Special Grand Jury</i> <ul style="list-style-type: none"> <li>— Some jurisdictions allow special grand juries</li> <li>— A.R.S. § 21-402               <ul style="list-style-type: none"> <li>• "Additional grand juries shall be called on the petition of the county attorney stating the reasons therefore."</li> </ul> </li> </ul> </li> </ul> |
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## The Historical Perspective

- "The institution of the grand jury is of ancient origin."
  - *Conway v. Quinn*, 168 S.W.2d 455, 446 (1942)
- It "may go back as far as Athens, but safely can be traced to the fourteenth century reign of Edward III"
  - Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 Minn. L. Rev. 398, 408-09 (2006)



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## American History

- Colonies
  - Buffer between the colonists and the king
- Revolution
  - Was a topic of discussion during the constitutional convention, but not included in the ratified constitution

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## United States Constitution

- *Bill of Rights*
  - "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."
    - Fifth Amendment
- Grand Juries are intended to protect "against hasty, malicious and oppressive prosecution."
  - *Wood v. Georgia*, 370 U.S. 375, 390 (1962)

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### Modern Usage

#### Globally

- Nope
- United States and Maybe Liberia

#### Nationally

- All States & D.C. appear to have statutes, not all use

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### Preliminary Hearing

- Available to all defendants charged by a complaint
  - Ariz. R. Crim. P. 5.1(a)
- Timelines
  - 10 Days from initial appearance if in custody
  - 20 days if out of custody
    - Ariz. R. Crim. P. 5.1(a)
- Nature of Hearing
  - Limited to probable cause
  - In open court
  - Witnesses subject to cross examination
  - Hearsay admissible if admissible at trial
  - Victim's rights apply
    - A.R.S. § 13-4402(A)

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### Supervening Indictment

- An indictment that is filed after a defendant has had an initial appearance
- Applies when the defendant has been arrested either on probable cause or a warrant, or charged by complaint
- Filed before preliminary hearing

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### Arizona's Grand Jury System

- Not referenced in Arizona's Constitution
  - Preference for Preliminary Hearings
    - No person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment; no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination.
      - Ariz. Const. Art. 2, § 30
  - But Grand Juries existed statutorily since territorial days

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### Arizona's Grand Jury System

- Bifurcated System
  - County Grand Juries
  - State Grand Juries

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### County Grand Juries

- "A body of the required number of qualified persons who are duly convened and impanelled by the presiding judge of the superior court and who are sworn to inquire into public offenses that may be tried within the county, including corrupt or willful misconduct in office of public officials within the county."
  - A.R.S. § 21-401(2)
- Offenses must occur in the county
  - A.R.S. § 21-407

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### “Qualified Persons”

#### Statutory Qualifications (§ 21-202)

- Citizen
- Resident of the jurisdiction where summoned
- Not a convicted felon
- Not adjudicated mentally incompetent or insane

#### Criminal Rules of Procedure 12.2

- A witness in the matter
- Interested directly or indirectly in the matter under investigation;
- Related within the fourth degree by either consanguinity or affinity to a person under investigation, a victim, or a witness; or
- Biased or prejudiced in favor of either the State or a person under investigation.

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### Public Offenses

- Any act or omission that Arizona statute imposes a term of imprisonment or a fine
  - A.R.S. § 13-105(27)
- ““Aggravating circumstances”” do not fall within this definition because they merely guide sentencing determinations and do not proscribe conduct that is punishable by a term of imprisonment or fine.”

– *Sanchez v. Ainley*, 234 Ariz. 250, 253 (2014)

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### “Impaneled by the Presiding Judge”

- Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office.

– *United States v. Williams*, 504 U.S. 36, 47 (1992)

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### How Many Jurors?

- At least 12, but no more than 16
- Must have at least 9 to indict
  - A.R.S. § 21-404

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### When Does It End?

- County > 200K = 4 Months
  - Must call a grand jury every 4 months
- County < 200k = 6 months
  - Called only if
    - County Attorney Requests
    - Judge Believes in the Public Interest
- A.R.S. §§ 21-402 & 21-403

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### County Grand Jury System

#### Using a Grand Jury

- Cochise County
- Coconino County
- Gila County
- La Paz County
- Maricopa County
- Mohave County
- Navajo County
- Pima County
- Pinal County
- Yavapai County
- Yuma County

#### No Grand Jury

- Apache County
- Graham County
- Greenlee County
- Santa Cruz County

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### The Prosecutor

- The county attorney shall attend when requested by GJ
- May examine witnesses
- Give GJ legal advice
- May draft indictments and issue subpoenas for evidence and witnesses

– A.R.S. § 21-408

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### State Grand Jury

- "The law applicable to county grand juries, including their powers, duties and functions, applies to the state grand juries except insofar as it is in conflict with this article."
- A.R.S. § 21-422(A)
- Major Exception
  - Can Only Investigate Crimes in § 21-422(B)

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### What Crimes?

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| <ul style="list-style-type: none"> <li>• State Tax Issues</li> <li>• Securities</li> <li>• Formation/Operation of               <ul style="list-style-type: none"> <li>– Banks, Insurance Companies, Pension Funds, Labor Unions, Professional Sports Enterprises, Corporate Enterprises</li> </ul> </li> <li>• Loan Sharking</li> <li>• Insurance Fraud</li> <li>• Crimes Committed by Public Officials               <ul style="list-style-type: none"> <li>– Bribery, Obstruction of Justice, Procurement</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>• Multiple County Cases Involving               <ul style="list-style-type: none"> <li>– Fraud, Stolen Property of Contraband, Gambling, Prostitution, Narcotics</li> </ul> </li> <li>• Perjury from Grand Jury</li> <li>• RICO Offenses (Title 13, Ch. 23)</li> <li>• Public Records Offenses in § 38-421, 39-161</li> <li>• Sexual Exploitation of Children if               <ul style="list-style-type: none"> <li>– Committed Using a Computer and</li> <li>– Multi-county</li> </ul> </li> <li>• Any County Referral</li> </ul> |
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### When Does It End?

- 6 Months
  - A.R.S. § 21-421 (C)

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### The Prosecutor

- Only the Attorney General and AAGs can present cases
  - A.R.S. § 21-424

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### The Case Presentation

- Witnesses
  - Sworn by foreman
    - (A.R.S. § 21-410)
  - Reliable hearsay is permitted as at a preliminary hearing
- Who Can Testify
  - Anyone the Grand Jury chooses to hear
  - In Arizona
    - Primarily law enforcement witnesses
  - Other Jurisdictions
    - Numerous witnesses testify as a fact gathering effort

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### Witnesses Under Investigation

- Suspects Under Investigation
  - Whether a target of a grand jury investigation is entitled to any Fifth Amendment warning is an open question.
    - *United States v. Washington*, 431 U.S. 181, 186 (1977)
  - Arizona Rule of Criminal Procedure 12.6
    - “A person under investigation . . . shall be advised of the right to remain silent and the right to have counsel present to advise the person while he or she is giving testimony.” See A.R.S. § 21–412

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### Witnesses Under Investigation

- May Request to Testify
  - Prosecutor must convey request to the Grand Jury
    - *Trebus v. Davis*, 189 Ariz. 621 (1997)
  - Defense attorney may provide “details of defendant’s proposed testimony” to help GJ decide whether to hear
    - *Bashir v. Pineda*, 226 Ariz. 351 (App. 2011)
- Defense attorney may be present but cannot communicate with anyone other than the witness.
  - A.R.S. § 21-412

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### Non-Suspect Witnesses

- Non-Miranda Fifth Amendment Standard
- Witnesses can only refuse to answer questions that “tend to incriminate by furnishing one link in the chain of evidence required to convict.”
  - *Flagler v. Derickson*, 134 Ariz. 229, 231–32(1982)
- Victims can be subpoenaed to testify

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### All Witnesses

- Testimony can be compelled by seeking immunity
  - A.R.S. § 13-4064
- Under Oath
  - Perjury laws apply
- Must answer questions posed by the Grand Jury
  - A.R.S. § 13-4073 (refusal to testify); A.R.S. § 13-4064 (order compelling testimony)

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### Document Subpoenas?

- Prosecutor has authority to subpoena witnesses to appear before grand jury
  - A.R.S. § 13-4071
- Subpoenas for documents are actually subpoenas for witnesses with an alternative method of compliance:
  - Example
    - “Alternatively, you may comply with this subpoena by delivering the requested material to: [Special Agent], \_\_\_\_\_, Phone: (602) [Agent Phone #], Fax: (602) [Agent Fax #], prior to your scheduled appearance, if you so choose.”

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### Testimony

- Question and Answer
  - Prosecutor
  - Grand Jurors
- Rules of Evidence do not Apply, except privilege
  - Ariz. R. Evid. 1101(d)
- Court reporter
  - Present
    - Transcribes all proceedings
    - A.R.S. § 21-410

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## Deliberations and Indictments

- Done in secret
  - Only final vote is recorded
    - Ariz. R. Crim. P. 12.4, 12.7(b)
- Issue an indictment if finds probable cause
  - A.R.S. §§ 21-413 & 21-414

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## Secrecy

### People Allowed in the Grand Jury

- Witness under examination;
- Counsel for a witness under investigation
- A law enforcement officer or detention officer accompanying an in-custody witness
- Authorized prosecutors
- Certified court reporter; and
- Interpreter
  - Ariz. R. Crim. P. 12.4

### Authorized Disclosure

- Knowingly discloses to another the nature or substance of any grand jury testimony, decision, matter except:
  - Proper discharge of official duties,
  - At the discretion of the prosecutor to inform a victim of the status of the case
  - When permitted by the court in furtherance of justice.
- Class 1 misdemeanor
  - A.R.S. § 13-2812

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## Victim Notification

- Generally, no right to notice of a grand jury proceeding
- “Criminal Proceeding”
  - Ariz. R. of Crim. P. 39
    - A criminal proceeding is “any matter scheduled and held before a trial court”
  - A.R.S. § 13-4401(7)
    - Criminal proceeding “does not include any . . . grand jury proceeding.”
- Notice is only discretionary
  - A.R.S. § 13-2812

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### What if there is no Indictment?

- Grand Jury decision not to indict is not an acquittal or dismissal
  - A.R.S. § 13-4410
  - Fallback is discretionary notice
  - A.R.S. § 13-2812
  - Also, First Amendment may permit disclosure
- Pretrial notice requirements
  - If prosecutor declines the case after a “final submission by law enforcement” victim notification is required
  - A.R.S. § 13-4408

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### Challenges to the Grand Jury

- Challenge to Grand Jury
  - Not drawn according to law
- Challenge to Grand Juror
  - Unqualified (prior slide)
- Proceedings
  - “Only by filing a motion . . . alleging that the defendant was denied a substantial procedural right or that an insufficient number of qualified grand jurors concurred in the indictment.”
  - Ariz. R. Crim. P. 12.9

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### Substantial Procedural Right

- Three Types of Claims
  - Failure to notify grand jury that the suspect wants to testify
  - Clearly exculpatory evidence
  - Misleading testimony

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### Clearly Exculpatory Evidence

- "[E]vidence of such weight that it might deter the grand jury from finding the existence of probable cause."

– *Trebus v. Davis*, 189 Ariz. 621, 625 (1997)

- May include affirmative defenses
  - But the State has no obligation to present all possible exculpatory evidence or anticipate every defense

• *Francis v. Sanders*, 222 Ariz. 423, 427 (App. 2009)

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### Misleading Testimony

- Withheld evidence or inaccurate testimony
- By itself, inaccurate testimony cannot be challenged but
  - "[W]hen the State withholds information from the grand jury and couples that conduct with inadequate instructions on the law, the defendant may be entitled to a redetermination of probable cause by an independent grand jury."

• *Maretick v. Jarett*, 204 Ariz. 194, 198, ¶ 12 (2003)

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### What Cannot be Challenged

- Arizona courts have held that defendants cannot challenge the sufficiency or character of the evidence received by the grand jury.
  - *State v. Snelling*, 225 Ariz. 182, 186, ¶ 12 (2010); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 261 (1988) ("[T]he mere fact that evidence itself is unreliable is not sufficient to require dismissal of the indictment.")

- But, "[a] complaint about the quality or adequacy of the evidence can always be recast as a complaint that the prosecutor's presentation was 'incomplete' or 'misleading.'"

– *United States v. Williams*, 504 U.S. 36, 54 (1992)

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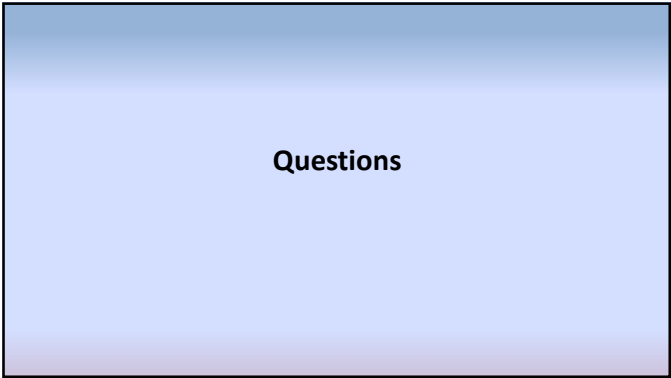
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